IN THE UNITED STATES ARMY
FIRST JUDICIAL CIRCUIT

U N I T E D S T A T E S	)	
	)	**DEFENSE REPLY**
	)	**TO PROSECUTION RESPONSE**
v.	)	**TO DEFENSE MOTION TO**
	)	**DISMISS ALL CHARGES WITH**
MANNING, Bradley E., PFC	)	**PREJUDICE**
U.S. Army, (b) (6)	)	
Headquarters and Headquarters Company, U.S.	)	
Army Garrison, Joint Base Myer-Henderson Hall,	)	DATED: 17 April 2012
Fort Myer, VA 22211	)	

RELIEF SOUGHT

1. In accordance with the Rules for Courts-Martial (R.C.M.) 701(g)(3)(D), the Defense moves to dismiss all charges in this case with prejudice.

BURDEN OF PERSUASION AND BURDEN OF PROOF

2. As the moving party, the Defense has the burden of persuasion. R.C.M. 905(c)(2). The burden of proof is by a preponderance of the evidence. R.C.M. 905(c)(1).

WITNESSES/EVIDENCE

3. The Defense does not request any witnesses for this motion, but respectfully requests this Court to consider the following evidence:

a) Defense Motion to Compel Discovery – AE VIII;
b) Prosecution Response to the Defense's Motion to Compel Discovery – AE XVI;
c) Defense Reply to the Prosecution Response to the Defense's Motion to Compel Discovery – AE XXVI;
d) Defense Motion to Dismiss All Charges With Prejudice – AE XXXI;
e) Prosecution Response to Defense Motion to Dismiss All Charges With Prejudice;
f) Email from then-CPT Fein[1] to the Court and Defense regarding classified discovery (22 March 2012) – Email Appendix;
g) Email from MAJ Fein to Defense regarding the 14 hard drives at issue in discovery (16 April 2012) – Email Appendix;
h) Audio Recording of Motions Argument (15 March 2012)["Oral Argument"];

[1] For ease of reference, all subsequent references to this email will be to "CPT Fein."

i) Enclosure to Prosecution Supplement to Prosecution Proposed Case Calendar – AE XII.

ARGUMENT

4. As the Army Court of Criminal Appeals has recently said, "[i]gnorance or misunderstanding of basic, longstanding … fundamental, constitutionally-based discovery and disclosure rules by counsel undermines the adversarial process and is inexcusable in the military justice system." *United States v. Dobson*, 2010 WL 3528822, at *7 (A. Ct. Crim. App. Aug. 9, 2010). In this case, the Government has wholly misunderstood those longstanding, fundamental and constitutionally-based rules, resulting in irreparable prejudice to PFC Manning.

5. In this Court's Ruling dated 23 March 2012, the Court made, *inter alia*, the following findings of law:

a) *Brady* requires the Government to disclose evidence that is favorable to the defense and material to guilt or punishment. Ruling: Defense Motion to Compel Discovery, p. 7, para. 2. [hereinafter "Ruling"].

b) RCM 701(a)(6)(Evidence favorable to the defense) codifies *Brady* and provides that the trial counsel shall, as soon as practicable, disclose to the defense the existence of evidence known to the trial counsel which reasonably tends to: (A) negate the guilt of the accused to an offense charged; (B) reduce the degree of guilt of the accused of an offense charged; or (C) reduce the punishment. Ruling, p. 8-9, para. 6.

c) *Brady* applies to classified information. Ruling, p. 7-8, para. 2.

d) Where the Government seeks to use MRE 505 to withhold classified information, a privilege must be claimed in accordance with MRE 505(c). Ruling, p. 7, para. 1.

e) The classification information privilege under MRE 505 does not negate the Government's duty to disclose information favorable to the defense and material to punishment under *Brady*. Ruling, p. 7-8, para. 2.

f) The requirements for discovery and production of evidence are the same for classified and unclassified information under RCM 701 and 703 unless the Government moves for limited disclosure under MRE 505(g)(2) or claims the MRE 505 privilege for classified information. Ruling, p. 8, para. 5.

g) RCM 701(f) applies to discovery of classified information only when the Government moves for limited disclosure under MRE 505(g)(2) of classified information subject to discovery under RCM 701 or when the government claims a privilege under MRE 505(c) for classified information. Ruling, p. 9, para. 6.c.

h) If classified discovery is at issue and the government does not wish to disclose the classified information in part or in whole to the defense, the government must claim a privilege under MRE 505(c). Ruling, p. 10, para. 11.

6. Based on the Court's findings of law and the Government's written and oral submissions, it is clear that the Government did not understand the relevant *Brady* standard; did not understand its obligations under R.C.M. 701(a)(2); and did not understand the process of classified discovery.

7. The Government contends that "[d]ismissal of all charges with prejudice would be an unjust remedy because the defense has provided no factual basis to support its argument." Prosecution Response to Defense Motion to Dismiss All Charges With Prejudice, p. 6. The Defense believes that it very clearly laid out the discovery violations in its Motion to Dismiss All Charges With Prejudice. However, the Defense will provide a further factual basis for its Motion herein.

8. Moreover, the Defense would note that the Government has not even made an attempt to rebut the Defense's argument that it committed a discovery violation. The only proffer that the Government makes in its "defense" is the following:

> The prosecution has, and will continue to, mirror the open file discovery system as much as practicable, taking into consideration the national security concerns relating to that which may be discoverable. [legal citations omitted]. To date, the prosecution has produced 2,729 unclassified documents, totaling 81,273 pages, and 41,550 classified documents, totaling 336,641 pages. Much of the information, discoverable or not, is owned by other government agencies and may contain multiple equity holders, requiring interagency coordination. The prosecution will continue to coordinate expeditiously with those entities to ensure the accused receives a speedy and fair trial.
>
> The defense alleges that the prosecution has committed discovery violations, to include a violation of Brady and RCM 701(a)(2). The three components of a discovery violation are as follows: first, that the evidence is discoverable; second, that the evidence was suppressed by the government; and third, that prejudice ensued. See Strickler v. Greene, 527 U.S. 263, 282 (1999) (listing elements for a Brady violation). No such violation exists because the prosecution has not suppressed discoverable information, but rather the Government required a military judge to regulate discovery under RCM 701 and MRE 505 and to enforce reasonable protective measures before authorizing further disclosure or inspection of classified information in light of national security concerns. This is evidenced by the original Prosecution Proposed Case Calendar where the prosecution outlined for the Court and the defense how much time it anticipates is needed to review voluminous classified material and be able to present much of this material to the Court under MRE 505 in a systematic and efficient process. The Court's recent rulings with respect to discovery and the protective order limit foreseeable risks to national security, thus satisfying those measures necessary to obtain approval for disclosure or inspection.

Prosecution Response to Defense Motion to Dismiss All Charges With Prejudice, p. 4 (citations omitted). When this is boiled down, it amounts to the following argument:

a) The Government already given the Defense a lot of discovery;
b) Discovery is complicated and requires much inter-agency co-ordination;

c) The Government did not outright suppress relevant evidence;
d) The Government was simply waiting for a military judge to help regulate discovery.

9. None of this, even if true,[2] provides any rebuttal to the specific issues raised in the Defense's Motion to Dismiss All Charges With Prejudice. How can the Government now say it understood that R.C.M. 701(a)(6) applies in light of its previous position that federal appellate *Brady* applied? How can the Government say that it understood that *Brady* mandates the disclosure of evidence that is favorable for sentencing when: a) it believed *Brady* to be concerned with "findings of guilt"; and b) it refused to turn over damage assessments because they did not contain material that was favorable for the merits? How can the Government say that it understood classified discovery when its position was that R.C.M. 701 does not apply in classified evidence cases?

10. These are but a few of the questions that the Government should have attempted to answer. Its lack of an answer to them speaks volumes and can be construed as nothing short of an admission that the Government has full knowledge that it committed very serious discovery violations.

11. The Defense will address the relevant issue as follows. First, it will explain in detail why it is clear that the Government did not understand *Brady*, R.C.M. 701(a)(2), or classified discovery. Next, it will highlight the Government's convenient *ex post* revisionism of the facts. Finally, it will explain why the Government's discovery violations warrant dismissal of all charges with prejudice.

A) The Government Engaged in Grossly Negligent or Willful Discovery Violations

i) The Government Did Not Understand the Relevant Brady Standard

12. The Government's written submissions, oral submissions, and conduct illustrate that it did not understand its *Brady* obligations. It is clear from the Government's statement of law in the Prosecution Response to Defense Motion to Compel Discovery that it does not understand what *Brady* mandates under military law.

- The Government does not cite once to R.C.M. 701(a)(6), the military's version of *Brady*, in its 15-page response to the Defense's motion to Compel Discovery.

- The Government believes that its *Brady* obligations are governed by the federal appellate standard. It states the relevant standard as follows:

[2] The Defense would contest the accuracy of c) and d), as outlined in more detail herein. The Government cites *Strickler v. Greene*, 527 U.S. 263, 282 (1999) for the elements of a *Brady* violation: "first, that the evidence is discoverable; second, that the evidence was suppressed by the government; and third, that prejudice ensued." Prosecution Response to Defense Motion to Dismiss All Charges With Prejudice, p. 4. The government implies that the "suppression" must be deliberate (i.e. the government actively concealed the information). However, *Stickler*, says no such thing; instead, the Supreme Court in *Strickler* states that "that evidence must have been suppressed by the State, either willfully or inadvertently." *See* 527 U.S. at 282. Moreover, the Government is again confusing pre-trial/trial issues with appellate issues. *Strickler* deals with the standard of review for *Brady* violations that are discovered post-trial.

> "Favorable evidence 'is subject to constitutionally mandated disclosure when it 'could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." (citing *Cone v. Bell*, 556 U.S. 449, 464 (2009)). Evidence is 'material' within the meaning of *Brady* when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would be different." *Id*.at 469.

This is obviously not the correct standard. Under this standard, evidence would only be subject to disclosure under *Brady* if it would be an absolute "game-changer." In *United States v. Safavian*, 233 F.R.D. 12, 13-14 (D.D.C. 2005), the court indicated why the appellate standard was not (and could not be) the appropriate *Brady* standard for prosecutors to use:

> The government acknowledges that under *Brady* it has the affirmative duty to produce exculpatory evidence when such evidence is material to either guilt or punishment. But it contends that evidence is "material" only "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *The problem with this iteration of Brady and the government's view of its obligations at this stage of the proceedings, however, is that it permits prosecutors to withhold admittedly favorable evidence whenever the prosecutors, in their wisdom, conclude that it would not make a difference to the outcome of the trial*. Most prosecutors are neither neutral (nor should they be) nor prescient, and any such judgment necessarily is speculative on so many matters that simply are unknown and unknowable before trial begins: which government witnesses will be available for trial, how they will testify and be evaluated by the jury, which objections to testimony and evidence the trial judge will sustain and which he will overrule, what the nature of the defense will be, what witnesses and evidence will support that defense, what instructions the Court ultimately will give, what questions the jury may pose during deliberations (and how they may be answered), and whether the jury finds guilt on all counts or only on some (and which ones).
>
> *The prosecutor cannot be permitted to look at the case pretrial through the end of the telescope an appellate court would use post-trial. Thus, the government must always produce any potentially exculpatory or otherwise favorable evidence without regard to how the withholding of such evidence might be viewed-with the benefit of hindsight-as affecting the outcome of the trial. The question before trial is not whether the government thinks that disclosure of the information or evidence it is considering withholding might change the outcome of the trial going forward, but whether the evidence is favorable and therefore must be disclosed*. Because the definition of "materiality" discussed in *Strickler* and other appellate cases is a standard articulated in the post-conviction context for appellate review, it is not the appropriate one for prosecutors to apply during the pretrial discovery phase. The only question before (and even during) trial is whether the evidence at issue may be "favorable to the accused"; if so, it must be disclosed without regard to whether the failure to disclose it likely would affect the outcome of the upcoming trial. (emphasis added)

- The Government does not believe that favorable evidence for sentencing is *Brady* material. It cites cases for the proposition that: a) "[e]vidence that is material to guilt will often be material for sentencing purposes as well; the converse is not always true" and; b) "the proper standard of materiality must reflect our overriding concern with the justice of the *finding of guilt*." Prosecution Response to Defense Motion to Compel Discovery, p. 6 (emphasis added by Government). The citations clearly show that the Government believes that favorable evidence for sentencing is not subject to disclosure under *Brady*.

13. After oral argument, on 21 March 2012, the Court asked the Government to respond, *inter alia*, to the following question: Is there any favorable material [in the damage assessments the Government has reviewed?]. The Government's response with respect to the DIA and IRTF reviews was that there was favorable material.[3] It stated that it found information that is favorable to the accused that is material to punishment. It further stated that it had not found any favorable material relevant to findings. The concession that the damage assessment is "favorable" is wholly at odds with the Government's statement two weeks earlier in its Response to Defense Motion to Compel Discovery, where it flat-out stated, "[t]he alleged damage assessment by the IRTF is not 'relevant and necessary.'" *Id.*, p. 10.

14. In its findings the Court stated that the "IRTF damage assessment is relevant and necessary for discovery under *Brady* and RCM 701(a)(6)." Ruling, p. 11. The fact that the Government did not view as *relevant* that which it conceded was *favorable* to the accused plainly illustrates that it does not understand the *Brady* standard for discovery.

15. In oral argument, the Government further proved that it did not understand the *Brady* standard. CPT Fein was asked by the Court to articulate what he believed *Brady* entailed. CPT Fein hesitated and could not answer the question without looking down at his notes. He stated:

> Ma'am – I don't even want to cite it incorrectly. Ma'am we are required through *Brady* and its progeny to do a due diligence search in order to find exculpatory … one moment please ma'am [pause] … to search for any information that is material to either guilt or to punishment irrespective of the good or the bad faith of the prosecution in turning over that material.

Oral Argument, 15 March 2012, at 1:03:19. The latter part of trial counsel's statement makes absolutely no sense and has nothing to do with the standard for disclosure under *Brady*.

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[3] At oral argument, CPT stated that he could not disclose whether these damage assessments contained favorable information because that fact was classified.

> **Court:** None of the damage assessments are *Brady* material?
> **CPT Fein:** Ma'am I do not have authority to answer that question.
> **Court:** Why not?
> **CPT Fein:** Because it's classified information.

Oral Argument, 15 March 2012, at 1:10:30. Apparently, five days later, that fact (whether the damage assessments contained favorable information) was no longer classified as the Government was able to send the requested information via a non-secure email. The Defense believes that whether the damage assessments contained *Brady* material was never classified information and thus, the Government misrepresented this fact to the Court.

16. While the Defense appreciates that oral argument can be intense and stress-inducing, the Court asked a very basic question that the Government should have been able to respond to without consulting pre-written notes. The fact that the Government claims it fully understands its *Brady* obligations, but cannot articulate what those obligations are without a cheat-sheet, shows that the Government does not actually understand its *Brady* obligations. Moreover, even with the cheat-sheet, the Government still could not pin down the *Brady* standard, saying that *Brady* requires the government "to search for any information that is material to either guilt or to punishment irrespective of the good or the bad faith of the prosecution in turning over that material." Oral Argument, 15 March 2012, at 1:03:19.

17. After the Court's ruling on 23 March 2012, the Government went to great pains in its subsequent emails with the Court and the Defense to clarify that it understood its *Brady* obligations. Unfortunately for the Government, the proof is in the pudding. The Government's 15-page Response to Defense Motion to Compel Discovery, its statements at the oral argument, and its refusal to see the damage assessments as *Brady* material lead to one absolutely inescapable conclusion: that the Government did not understand *Brady*.

ii) The Government Did Not Understand its General Discovery Obligations Under R.C.M. 701

18. In addition, the Government did not understand discovery under R.C.M. 701(a)(2). Not once is R.C.M. 701(a)(2) cited in the Government's Response to the Defense Motion to Compel Discovery. Instead, the Government cited to R.C.M. 703, the rules governing production of evidence, to deny the discovery requested by the Defense. The reference to R.C.M. 703 was not an accident; the Government cited to R.C.M. 703 thirty-five times in its motion. It believed that it was only obligated to turn over specifically-requested items where the Defense could prove, to the Government's satisfaction, that the items were "relevant and necessary" to an element of the charged offense. This is a much higher threshold than that which is actually mandated by R.C.M. 701(a)(2). The Government's failure to understand the correct standard under R.C.M. 701(a)(2) (or, more accurately, its failure to understand that R.C.M. 701(a)(2) governed disclosure of items within its possession, custody or control) meant that the Defense was not provided with the needed-discovery.

19. Further, the Government maintained that it was "unaware" of the existence of any forensic results or investigative files relevant to the case maintained by DOS, FBI, DIA, ONCIX and CIA. The Court ruled that "[t]hese agencies are closely aligned with the Government in this case. The Government has a due diligence duty to determine whether such forensic results or investigative files that are germane to this case are maintained by these agencies." Ruling, p. 11. This clearly shows that the Government did not understand its obligations of due diligence in respect of the requested-discovery.

iii) The Government Did Not Understand How Classified Discovery Works

20. This case is an important classified evidence case. And the Government has outright admitted that it does not know how classified discovery works. The Defense has consistently maintained that R.C.M. 701 governs discovery, both classified and unclassified. While R.C.M. 701(f) provides that nothing in the section shall require the disclosure of classified discovery, this does not mean that R.C.M. 701 does not apply to classified discovery. The Government in

its Response to the Defense Motion to Compel Discovery alluded to the fact that R.C.M. 701 does not control classified discovery when it stated, "The rule does not govern the production of classified information. See R.C.M. 701(f) ("nothing in this rule shall…require the disclosure of information protected from disclosure by [MRE 505]").

21. In oral argument, CPT Fein stated that R.C.M. 701(a)(6)/*Brady* does not apply to classified information: "[b]ut 701(a)(6) does not apply to classified information, which is what I started with. The United States has complied with its obligations under 701. The one big elephant in the room unfortunately is that everything the defense is requesting that we have not produced in discovery is classified information." Oral Argument, 15 March 2012, at 1:04.

22. On 22 March, 2012, CPT Fein sent an email to the parties where he stated, in no uncertain terms, the Government's position that R.C.M. 701 does not apply to classified discovery:

> As litigated at the motions hearing, the government's position is that classified information does not fall under RCM 701. The information the defense has requested in discovery is classified and the prosecution has no reason to believe it is not classified. Because the information is classified, RCM 701 does not apply (as per RCM 701(a) and (f)), which leaves the prosecution to use the standards under MRE 505 along with Brady and its progeny. The defense provided no authority to apply RCM 701(a)(2) or (6) to classified information and all the authorities only reference unclassified information. The prosecution has relied on MRE 505 and Brady for regulation of what classified information is discoverable.
>
> The United States Government must always weigh the necessity to provide the defense access to classified information and protecting national security. The normal open-file procedures in the military justice process does not and cannot apply to classified information, although in this case the government has turned over as much classified information as possible while still protecting national security. The parties are now at a point where the defense wants access to classified information that the government does not agree to disclose under MRE 505(g)(1). To date, the only classified information the defense has requested which the government has withheld are items subject to the motion to compel, because they are more sensitive than the other classified information previously produced. The prosecution has maintained from the beginning of this case, that it intends to produce all discoverable information, under our legal and ethical obligations.
>
> Just because the defense requests classified information does not mean it is discoverable, as outlined in MRE 505 and relevant case law. The United States understands its Constitutional obligations to ensure a fair trial while balancing national security interests by protecting classified information.

Email from CPT Fein, 22 March 2012.

23. This email shows just how off-base the Government is on its discovery obligations and on trying a classified evidence case generally. Its position is that because the information is classified, R.C.M. 701 does not apply, leaving the Government to use the standards set forth

under M.R.E. 505 and federal *Brady*. The Government then assumed the job of being the arbiter of what is discoverable, by balancing the rights of the accused with the interests of the United States government in protecting national security. In short, the Government has usurped the role of the military judge by becoming the sole authority of when national security concerns should yield to the rights of the accused, and vice versa. It is startling to believe that the Government would consider it appropriate for a prosecutor to balance national security with the rights of the party who it is prosecuting. The Government failed to realize that such balancing, to the extent it must be done, is fully within the purview of the military judge. And, it is only appropriate *after* the Government has engaged the processes of M.R.E. 505.

24. The Government, in its motion, email, and in oral argument repeated that M.R.E. 505 governs production of classified information. But this is only half-true. M.R.E. 505 does not apply unless the Government claims a privilege. As the Court stated in its Ruling, "[i]f classified information detrimental to national security is at issue and the government does not wish to disclose the classified information in part or in whole to the defense, the government must claim a privilege under MRE 505(c)." Ruling, p. 10. The Court has found that in this case "[n]o government entity in possession of any discovery at issue has claimed a privilege under MRE 505(c)." *Id*. The Government, in addition to not understanding that classified evidence is subject to disclosure under R.C.M. 701, failed to understand the appropriate process for not disclosing relevant discovery under M.R.E. 505.

25. In short, the Government: a) thought that R.C.M. 701 does not govern classified discovery (whereas the Court found that it did); b) thought that the Government, and not the judge, should engage in a balancing test of the rights of the accused and the interests of national security; and c) failed to follow the appropriate process for claiming a privilege under M.R.E. 505, all while withholding discovery from the Defense.

26. This case shows a cataclysmic failing of the Government to understand all aspects of the discovery process. As the Defense indicted in its Motion to Dismiss All Charges With Prejudice, it is not clear whether the Government's position on discovery amounted to gross negligence or willful misconduct.

27. The Defense believes, however, that there is ample evidence to support the contention that the discovery violations are willful, as the Government seems to be resisting handing over exculpatory evidence at every turn. Among the factors suggesting that the discovery violations are willful:

- The Government's refusal, up until very recently, to acknowledge that at least some of the damage assessments are *Brady* material. In oral argument, the following exchange occurred:

> **Court:** None of the damage assessments are *Brady* material?
> **CPT Fein:** Ma'am I do not have authority to answer that question.
> **Court:** Why not?
> **CPT Fein:** Because its classified information.

Oral Argument, 15 March 2012, at 1:10:30. The Government's failure to acknowledge whether the damage assessments are *Brady* material deliberately makes it difficult for the Defense to compel such discovery as being *Brady* material and to hold the Government accountable for its discovery violations.

- The Government's practice of referring to the damage assessments as "alleged" in order to make it difficult for the Defense to compel discovery of something that is not even confirmed to exist.

- The Government's misleading use of the phrase, "[X entity] has not completed a damage assessment" when it should have said, "[X entity] has not finished completing its damage assessment." The former implies that such a damage assessment was never even performed, leading one to believe that the Defense's request is moot.

- The Government maintaining that it is "unaware" of forensic results from various organizations, without stating it looked for those results. Normally, when a party states that it is "unaware" of certain results, this implies that it undertook to search for those results on good faith basis.

- The Government claiming that it does not know what discovery the Defense is seeking and asking the Defense to make the request with more specificity; all while claiming that the information is not "relevant and necessary." As previously pointed out, these two things are inconsistent.

- The Government claiming, during a telephonic 802 session, that work product is not exempt under *Brady*, but then stating that because the State Department has not "completed" a damage assessment, such an assessment is not subject to disclosure. Again, the two are inconsistent. As a result of the Government's inconsistent positions on this issue, this Court ordered the Government to produce a witness from the State Department to appear at the oral motions argument to confirm what information is or is not available within that agency.

- The Government deliberately misunderstanding the Defense's position regarding the potential evidence to be obtained from a search of the 14 hard drives, and then resisting performing simple computer searches that it has a good faith basis to believe will yield favorable evidence for the accused.

28. This behavior by the Government would seem to suggest that the wholesale discovery violations are part of a deliberate pattern to deny discovery to the Defense. *United States v. Hsia*, 24 F. Supp. 2d 14, 30 (D.D.C. 1998) ("[C]ourts in this jurisdiction look with disfavor on narrow readings of the government's *Brady* obligations; it simply is insufficient for the government to offer "niggling excuses" for its failure to provide potentially exculpatory evidence to the defendant, and it does so at its peril.").

29. Whether such discovery violations are willful or grossly negligent is of no particular import, as both are inexcusable. *See United States v. Dobson*, 2010 WL 3528822, at *7 (A. Ct. Crim.

App. Aug. 9, 2010) ("While we defer to the military judge's evaluation of the witnesses' credibility and his finding that the government's violation of discovery rules was not deliberate, but rather ignorant, neither is tolerable. Hiding the ball and 'gamesmanship' have no place in our open system of discovery.") (*citing United States v. Adens*, 56 M.J. 724, 731 (C.A.A.F. 2002) (broad discovery at an early stage reduces pretrial motions, surprise, and trial delays ... leads to better informed judgments about the merits of the cases and encourages broad early decisions concerning withdrawal of the case, motions, pleas, and composition of the court-martial—in short its practice "is essential to the administration of justice"); *United States v. Dancy*, 38 M.J. 1, 5 n.3 (C.M.A.1993) (explaining the "unfortunate consequences of a trial counsel's disregard for the discovery rights of an accused")); *see also Breakiron v. Horn*, 642 F.3d 126, 133 n.8 (3rd Cir. 2011) ("In this regard the prosecutor has much to answer for. When asked at oral argument why the prosecutor did not disclose this material, the Commonwealth conceded that it 'seems a little strange.' The Commonwealth also conceded that such material would have been disclosed 'under the modern rules of discovery.' That response is at once true and insufficient. It was so well-established before [defendant's] trial as to have been axiomatic that prosecutors must disclose impeachment evidence like that at issue here. The Commonwealth has not otherwise attempted to explain why this material was not disclosed or to defend the prosecutor's failure to disclose it. Like the District Court, we are troubled by that failure. We are at a loss to understand why prosecutors, so long after *Brady* became law, still play games with justice and commit constitutional violations by secreting and/or withholding exculpatory evidence from the defense.").

B. The Government Is Now Engaged In *Ex Post* Revisionism

30. The Government has now engaged in deliberate *ex post* revisionism by pretending that they did not say what they clearly said and did not do what they clearly did. Unfortunately for the Government, its responses and representations were in writing, in open court, or in sessions with the Military Judge. The Government cannot now sweep this under the rug by make-believing that these discovery violations did not happen.

31. It is telling that among the evidence that it would have the Court consider, it does not list its *own* Response to the Defense Motion to Compel or its own email regarding classified discovery. This is the best evidence of the standard the Government was operating under until it was corrected by the Military Judge.

32. The following plainly illustrates the Government's *ex post* revisionism:

a) In its latest Response, the Government "largely agrees with the defense's recitation of the discovery rules in its Reply." Prosecution Response to Defense Motion to Dismiss All Charges With Prejudice, p. 3. This is inconsistent with its actual Response to the Defense Motion to Compel Discovery which cites almost exclusively to R.C.M. 703. It does not reference 701(a)(2) or 701(a)(6) even once.

b) In its latest Response, the Government states, "The prosecution shall disclose evidence that is favorable to the accused and material to either guilt or punishment." Prosecution Response to Defense Motion to Dismiss All Charges With Prejudice, p.

3. In its early Response to the Defense Motion to Compel Discovery, it cited a case which stated that the relevant standard "must reflect our overriding concern with the justice of the *finding of guilt*." Prosecution Response to Defense Motion to Compel Discovery, p. 6. Accordingly, it did not provide the Defense with *Brady* material from any damage assessment because such material was favorable only with respect to punishment, but not the merits. *See, e.g.* Prosecution Response to Defense Motion to Compel Discovery at p. 10 ("Actual damage, if any, is not relevant to any element of the charged offenses.").

c) In its latest Response, the Government states that "the prosecution shall *always* provide *Brady* material." Prosecution Response to Defense Motion to Dismiss All Charges With Prejudice, p. 6 (emphasis by Government). This is wholly inconsistent with its earlier position that classified information is not subject to the military *Brady* standard, R.C.M. 701(a)(6). *See e.g.* Oral Argument, 15 March 2012, at 1:04 (trial counsel stating "But 701(a)(6) does not apply to classified information, which is what I started with.").

d) In its latest Response, the Government states, "The prosecution has, and will continue to, mirror the open file discovery system as much as practicable, taking into consideration the national security concerns relating to that which may be discoverable." Prosecution Response to Defense Motion to Dismiss All Charges With Prejudice, p. 4. This is a far cry from its position a couple of weeks ago that "[t]he normal open-file procedures in the military justice process does not and cannot apply to classified information." Email from CPT Fein, 22 March 2012.

e) In its latest Response, the Government repeatedly states that "no [discovery] violation exists because the prosecution has not suppressed discoverable information, but rather the Government required a military judge to regulate discovery under RCM 701 and MRE 505 and to enforce reasonable protective measures … [for] classified information." Prosecution Response to Defense Motion to Dismiss All Charges With Prejudice, p. 4, 6. This is plainly not true. The Government did not engage the assistance of the military judge "to regulate discovery." Rather, *the Defense* engaged the assistance of the military judge after the Government refused to turn over the requested discovery on an improper basis. If the Government had sought the assistance of the military judge, it would have, for instance, sought *in camera* review of the requested matter or claimed a privilege under M.R.E. 505.[4] It did neither in this case. Moreover, how can the Government say that it "required a judge to regulate [classified] discovery under R.C.M. 701" when it outright stated "because the information is classified, RCM 701 does not apply?" Email from CPT Fein, 22 March 2012. The Government cannot be permitted to say that it was waiting for a judge to regulate discovery under R.C.M. 701 when it did not believe that R.C.M. 701 was the governing standard for classified discovery.

[4] If the Government were simply waiting for a judge to regulate discovery, it would be in a position at the time of referral to claim a privilege. The case was referred to a general court martial on 3 February 2012 and the Government now has until 18 May 2012 to assert a privilege. The proceedings have thus been delayed almost four months waiting for equity-holders to assert a privilege.

f) In its Response, the Government refutes the Defense's argument that it used the wrong standard by stating, "[t]o the contrary, as stated on the record and as provided above, the prosecution continues its search for discoverable information under *Williams* and will produce that which the rules of discovery under RCM 701 or the Court require." Prosecution Response to Defense Motion to Dismiss All Charges With Prejudice, p. 7. The Government's phraseology here is suspect. It appears to be stating that it has always used the relevant R.C.M. 701(a)(6)/*Brady* standard ("continues its search … under *Williams*"). However, the Government could not in good faith make that contention because it is clear from its original Response motion that it did not realize that R.C.M. 701(a)(2) and R.C.M. 701(a)(6) were the relevant standards. *See* discussion above. So, the Government uses deliberately ambiguous wording to suggest that it has always operated under the correct discovery standard—which it has not.

33. This Court cannot accept the Government's ritual incantations that it understands its *Brady* and other discovery obligations. *See United States v. Cerna*, 633 F. Supp. 2d 1053, 1056 (N.D. Cal. 2009) (noting that "the government is fond of saying that it knows its *Brady* obligations and will honor them"); *United States v. Hsia*, 24 F. Supp. 2d 14, 29 (D.D.C. 1998) ("While the government has represented that it 'understands its *Brady* obligations and it fully intends to abide by them,' the Court shares defense counsel's skepticism."); *United States v. Naegele*, 468 F. Supp. 2d 150, 152 n.2 (D.D.C. 2007) ("[N]ow that the Court realizes that its view of *Brady* and the government's have not been consistent for many years, it no longer accepts conclusory assertions by the Department of Justice that it 'understands' its *Brady* obligations and 'will comply' or 'has complied' with them."); *United States v. Lim*, 2000 WL 782964, at *3 (N.D. Ill. June 15, 2000) ("The government's response—which is and has been its stock response to such motions as long as the Court can recall—is that the government 'recognizes its obligation' to produce material pursuant to *Brady* and *Giglio*, that 'the government will abide by the law,' and that the motion should therefore be denied as 'moot.' … [T]his Court does not believe that this is an appropriate way to deal with a matter as important as the government's obligation to produce material that is favorable to an accused."). Here, there is overwhelming evidence that proves that the Government did not understand its obligations; accordingly, the Government's repeated representations that it understands its discovery obligations ring hollow.

C. Dismissal of All Charges With Prejudice is the Only Appropriate Remedy

34. The Government argues that even if it committed discovery violations, dismissal of all charges would be an unjust and improper result. The Defense submits that continuing to prosecute an irreparably flawed case would be a more unjust and improper result.

35. The Government states that there are procedures to remedy any discovery violations. In particular, it states that an *in camera* review is one such procedure that can act as a remedy. According to the Government, "this review ensures all discoverable information is produced." Prosecution Response to Defense Motion to Dismiss All Charges With Prejudice, p. 5. The Government does not explain *how* an *in camera* review will "ensure[ ] that all discoverable information is produced." *Id.* All it ensures is that particular evidence *known* to the Defense will

be produced. It does not in any way ensure that all *Brady* evidence is produced.[5]

36. Further, the Government states that the "prosecution is in a position to cure any possible prejudice to the accused, particularly in light of its ongoing search for discoverable information given the volume and substance of the accused's charged misconduct."[6] Prosecution Response to Motion to Dismiss All Charges With Prejudice, p. 5. The Government further states:

> The prosecution promptly requested all government entities whose files the prosecution is required to search under Williams to segregate and *preserve* any records related to the accused, WikiLeaks, and the evidence in this case. Those entities continue to preserve such records. Ordering the prosecution to adopt alternative discovery procedures in its continuous review of these preserved records, a task the prosecution will expeditiously pursue if ordered, is another remedy available to the Court, short of dismissal.

Id. (emphasis in original). It appears that the Government is saying that *from now on*, it will use the appropriate discovery standards in reviewing potentially discoverable material. How does this remedy the prejudice that the Government has caused by failing to review the material under the correct standard for the past two years?

37. As the Government notes, there is potentially discoverable information in a myriad of aligned and non-aligned agencies. According to the Government: "[i]n total, the prosecution requested thirteen departments, agencies, and military commands to segregate and preserve such records. Furthermore, the prosecution requested specific information that is potentially discoverable from more than fifty additional departments and agencies." Prosecution Response to Motion to Dismiss All Charges With Prejudice, p. 2.

38. The problem (which the Government refuses to even acknowledge) is that the Government has been conducting a *Brady* search using an improper standard—i.e. a standard much higher than that actually mandated by R.C.M. 701(a)(6). The Government was looking for evidence that was exculpatory on the merits; it was not looking for evidence that was "favorable to the accused" in that it reasonably tended to reduce punishment. *See* R.C.M. 701(a)(6). Indeed, the Government did not think that *Brady* covered information that was material to punishment. It stands to reason that there is *Brady* material (properly understood) that has been "overlooked" by the Government in its two year search.

39. The Government seems to think that the volume of provided-discovery somehow cures its failure to perform an appropriate *Brady* search. At one point, the Government says "[t]o date, the prosecution has produced 2,729 unclassified documents, totaling 81,273 pages, and 41,550 classified documents, totaling 336,641 pages." *Id.* at 2. Discovery obligations are not measured by volume. In other words, providing a large volume of discovery does not relieve the

[5] In fact, the Government just disclosed twelve pages of unclassified *Brady* materials to the Defense, all of which are dated as of November 2010. How is the Defense in a position to know how much other *Brady* material (unclassified or classified) the Government has been withholding?

[6] The Defense is not clear what the latter part of this sentence means ("given the volume and substance of the accused's charged misconduct.").

Government from providing all discovery which it is obligated to provide under *Brady*. If the Government produced 1,000,000 classified documents, spanning 100,000,000 pages, but no *Brady* material (when such material existed), this would still be a discovery violation. The Government's numbers here are a red-herring designed to detract attention from the fact that it has not complied with R.C.M. 701(a)(2) and R.C.M. 701(a)(6) and that it has not understood classified discovery.

40. The accused is denied a fair trial when he is not provided with constitutionally-required discovery. This cannot be cured by burying the accused in a sea of other discovery. Surely our military justice system cannot countenance a scenario where the accused is denied *Brady* material, but in its stead is provided with multiple and voluminous copies of Army Regulations, and other irrelevant (or marginally relevant) materials.

41. The only way to adequately cure the prejudice that the Government has caused is to require the Government to start anew, this time using the correct standard. Now when the Government reads all the documentation from the sixty-three agencies it has contacted, it can apply the appropriate standard and provide the accused with evidence which "reasonably tends to" negate guilt or reduce guilt or punishment. Any other order would punish the accused for the Government's discovery violations, while rewarding the Government for its conduct. If the Government is not ordered to conduct a "re-review" of evidence using the correct standard, the Government actually would fare better by using the incorrect standard of *Brady* review than it would by following the law. This would be an absurd result.

42. However, while in theory the appropriate remedy is that the Government is ordered to go back and "re-review" all the evidence in light of the correct standard, this will not work in practice. There are several reasons why this is not a viable option. First, the process of "re-review" will take a year or two. If the Government is still in the process of reviewing the documents for the very first time, why would a "re-review" of the documents take any shorter period of time? This would certainly run afoul of constitutional protections afforded with respect to speedy trial. Second, to the extent that the Government suggests that a "re-review" would not take two years, this is only because the Government would have every incentive to expedite the review to avoid the speedy trial clock. If a "re-review" of all documents from sixty-three different agencies can be done in a matter of months, one might wonder: *Why did it take so long the first time? How carefully is the Government really reviewing this documentation?* Third, the Government facing an inherent conflict of interest in any potential "re-review" for *Brady* material. If the Government were to find any *Brady* material that it missed the first time due to applying the wrong *Brady* standard, this would validate the Defense's concerns about the discovery violations. As such, the Government would have every incentive not to locate *Brady* material because that would prove that the Defense was correct about the *Brady* violations to begin with.

43. Moreover, as explained in more detail in the Defense Motion to Dismiss All Charges With Prejudice, *Brady* evidence may be lost or missing. The Government states that the Government has "promptly requested all government entities whose files the prosecution is required to search [for *Brady* material] to segregate and *preserve* any records related to the accused." Prosecution Response to Motion to Dismiss All Charges With Prejudice, p. 5. It stated that the purpose of

this request was to "ensure that no evidence is lost or destroyed." *Id.* at p. 5, n.3. The Defense does not believe that the filing of preservation requests means that the relevant information will actually be preserved. Nowhere is this more apparent than with the fourteen hard drives from PFC Manning's SCIF. The CID requested that the evidence be preserved in September 2010; the Defense also filed a preservation request in September 2011. The Defense has recently learned that that Government believes that most or all of the drives are not operational or have been wiped clean. In a recent email, the Government wrote:

> After consultation with the government forensic experts, it appears that out of the 14 hard drives that were identified to be present in the TOC or SCIF, 2 drives are completely inoperable, 7 drives are wiped, 4 drives have file structures present, and 1 drive is partially wiped. In total, only 5 drives have any information that could answer your request and ultimately the Court's order, dated 23 March 2012.

Email from MAJ Fein, 16 April 2012. Thus, the Government's assurances that it has segregated and preserved any records related to the accused should be viewed with skepticism.

44. Furthermore, we are two years into this case and the Defense has only just received a first glance at approximately twelve pages of *Brady* materials. All of these *Brady* materials are dated as of November 2010. Why is the Defense receiving these in April 2012, a year and five months after they were prepared? More *Brady* and other discoverable material may trickle in over the next few months. How can the Defense plan trial strategy, follow-up on investigative leads, and prepare for trial when it is still waiting for critical discovery? Our system was designed to provide discovery as soon as practicable; it does not envision withholding *Brady* and other specifically-requested discovery materials (e.g. grand jury testimony, investigative reports, etc.) and delivering them virtually on the eve of trial.

45. To condone such a situation would provide the Government with an unfair advantage. The Government has the full benefit of all the evidence, but is permitted to withhold that evidence from the Defense. For instance, in its 14 June 2011 Memorandum to the Defense Intelligence Agency, the Government requested that information related to PFC Manning, including documents that discussed harm or damage and any measures considered in response to the alleged leaks, be provided "immediately" to the Government. *See* Enclosure to Prosecution Supplement to Prosecution Proposed Case Calendar. The Government stated that "[t]his request is designed to allow the prosecutors to assess the totality of information available and held as records by other government agencies." *Id.* Clearly, the Government has had access to information for at least nine months that the Defense has not seen. This gives the Government a nearly one-year head start on the Defense in terms of dealing with, assimilating, and processing the implications of the relevant discovery. *See United States v. Safavian*, 233 F.R.D. 12, 19 (D.D.C. 2005) ("It is insufficient for the Justice Department merely to state that while documents are not currently in its (or the FBI's) possession it is continuing to make inquires of GSA employees about e-mails, correspondence and other documents regarding [matters in dispute] during the course of witness interviews.").

46. As the Defense stated in its Motion to Dismiss All Charges With Prejudice, the Government's interest in securing a conviction and making an example out of PFC Manning has

clouded the prosecutors' professional judgment. This is apt to happen in high-profile cases. It is no coincidence that many high-profile cases are plagued by serious discovery violations. *See United States v. Koubriti*, 336 F. Supp. 2d 676 (E.D. Mich. 2004) (dismissing charge due to the government's failure to disclose both classified and unclassified material documents during the first post-9/11 terrorism prosecution); *see also United States v. Stevens*, 2009 WL 6525926 (D.D.C. Apr. 7, 2009) (setting aside jury's guilty verdict and dismissing bribery charges against late Senator Ted Stevens given the prosecution's failure to disclose records of an interview favorable to the defense); *see also United States v. Libby*, 429 F. Supp. 2d 1 (D.D.C. 2006) (compelling the prosecution to disclose documents related to certain intelligence briefings during the perjury and obstruction of justice prosecution of former vice presidential advisor I. Lewis "Scooter" Libby); *see also United States v. Safavian*, 233 F.R.D. 12 (D.D.C. 2005) (ordering the government to produce a litany of documents and correspondence related to the obstruction of justice prosecution of former GSA chief of staff, David Safavian); *United States v. Behenna*, 70 M.J. 521 (A. Ct. Crim. App. 2011) (discussing the prosecution's failure to timely disclose a government doctor's opinion regarding forensic evidence favorable to the defense during a highly publicized court-martial for an alleged murder occurring in Iraq), *rev. granted*, 2012 CAAF LEXIS 61 (Jan. 13, 2012) (reviewing the issue of whether the government's failure to disclose the doctor's opinion constituted a violation of the accused's Sixth Amendment right to a fair trial). In this case, there is no remedy short of dismissal with prejudice that could cure the Government's egregious discovery violations.

CONCLUSION

47. For these reasons, and for the reasons outlined in the Defense's Motion to Dismiss All Charges With Prejudice and the Defense's Reply to the Government's Response to the Defense Motion to Compel Discovery, and in accordance with the R.C.M. 701(g)(3)(D), the Defense moves to dismiss all charges in this case with prejudice.

Respectfully submitted,

DAVID EDWARD COOMBS
Civilian Defense Counsel

EMAIL APPENDIX

22 March 2012 Email

Subject: RE: Discovery (UNCLASSIFIED)
From: [redacted] (Add as Preferred Sender)
Date: Thu, Mar 22, 2012 5:25 pm
To: [redacted]
Cc: [redacted]

Ma'am,

As litigated at the motions hearing, the government's position is that classified information does not fall under RCM 701. The information the defense has requested in discovery is classified and the prosecution has no reason to believe it is not classified. Because the information is classified, RCM 701 does not apply (as per RCM 701(a) and (f)), which leaves the prosecution to use the standards under MRE 505 along with Brady and its progeny. The defense provided no authority to apply RCM 701(a)(2) or (6) to classified information and all the authorities only reference unclassified information. The prosecution has relied on MRE 505 and Brady for regulation of what classified information is discoverable.

The United States Government must always weigh the necessity to provide the defense access to classified information and protecting national security. The normal open-file procedures in the military justice process does not and cannot apply to classified information, although in this case the government has turned over as much classified information as possible while still protecting national security. The parties are now at a point where the defense wants access to classified information that the government does not agree to disclose under MRE 505(g)(1). To date, the only classified information the defense has requested which the government has withheld are items subject to the motion to compel, because they are more sensitive than the other classified information previously produced. The prosecution has maintained from the beginning of this case, that it intends to produce all discoverable information, under our legal and ethical obligations.

Just because the defense requests classified information does not mean it is discoverable, as outlined in MRE 505 and relevant case law. The United States understands its Constitutional obligations to ensure a fair trial while balancing national security interests by protecting classified information.

v/r
CPT Fein

16 April 2012 Email

Subject: Hard Drives (EnCase Forensic Images)

Hard Drives (EnCase Forensic Images)

From: [redacted] (Add as Preferred Sender)

Date: Mon, Apr 16, 2012 3:52 pm

To: [redacted]

Cc: [redacted]

David,

After consultation with the government forensic experts, it appears that out of the 14 hard drives that were identified to be present in the TOC or SCIF, 2 drives are completely inoperable, 7 drives are wiped, 4 drives have file structures present, and 1 drive is partially wiped. In total, only 5 drives have any information that could answer your request and ultimately the Court's order, dated 23 March 2012.

Based on this information and in an effort to continue producing as much information in discovery as possible, regardless of classification, the United States is willing to produce forensic copies of the 5 drives to the defense, but only after receiving authorization from relevant OCAs, if classified information is identified on the drives. In order to make this happen, we will have our forensic experts continue their examination and then pass the information to the security experts to start a review. Our goal is to have the drives examined and approved for release by 18 May 2012, the Court's deadline for the other matters in the defense motion to compel.

The United States does not acknowledge any of the defense's arguments or stated interpretation of the relevant authorities. The United States maintains that a complete search of these drives is not material to the preparation of the defense, regardless of their classification. Additionally, the United States has never maintained that the forensic computer exams will take an extended period, but rather it would takes weeks for the security experts to review the 14 hard drives for classified information and the prosecution to obtain needed approvals. Now knowing that only five drives are at issue (the fifth being partially wiped), this process should not be too onerous for our security experts and they should be able to complete everything, including obtaining approvals, if any, within the next 30 days.

Please let us know whether this is acceptable and we will notify the Court. Additionally, please let us know whether you still require your forensic experts to travel this week or next week for the motions hearing.

v/r
Ashden